

APPEAL NO. 031211  
FILED JULY 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 15, 2003. The hearing officer determined that: (1) respondent (claimant) sustained a low back strain, but it did not occur in the course and scope of his employment; (2) appellant (carrier) waived the right to contest the compensability of the claim; and (3) claimant had disability from October 2 and continuing through December 8, 2002. Carrier appealed the determinations regarding carrier waiver, compensability as a matter of law, and disability. The file does not contain a response from claimant.

DECISION

We affirm as reformed.

We first note that the five conclusions of law are misnumbered. They are numbered as follows: 1, 2, 3, 2 and 3. We reform the decision to change the numbering of the conclusions of law, so that the conclusions of law are listed in the same order, but are numbered in order from one to five.

We also note that Finding of Fact No. 9 contains a clerical error. We reform Finding of Fact No. 9 to state as follows, "On December 9, 2002, the claimant was released to full duty by his treating physician who also certified that the claimant had reached clinical maximum medical improvement on that date without any permanent impairment."

Carrier contends that the hearing officer erred in determining that it waived the right to contest the compensability of the claim. In this case, claimant claimed that he injured his back at work on \_\_\_\_\_. The hearing officer did not believe claimant's testimony that he injured his back at work on that date. However, the hearing officer did find that claimant had damage or harm to his back. Carrier filed a "cert-21" within seven days of receipt of written notice of injury stating that benefits would be paid as they accrued. However, the hearing officer determined that carrier did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing compensability within 60 days.

Carrier specifically appeals the findings of fact that determined that it received written notice of the injury on October 7, 2002, and that it filed a "cert-21" on October 9, 2002. However, in its appeal, carrier does not appear to dispute these determinations and these determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier contends the hearing officer erred in determining that, although it executed a dispute of compensability on October 23, 2002, it did not file it until February 3, 2003. Ms. W, a claim representative for carrier, testified regarding the normal procedures undertaken to ensure that a TWCC-21 is filed. Ms. W named two ways the TWCC-21 might have been sent to the Texas Workers' Compensation Commission (Commission), but was not sure exactly how this TWCC-21 was sent to the Commission. It was carrier's contention that the Commission received the TWCC-21 and lost it. There was evidence that a copy was also sent to claimant at the same time it was sent to the Commission and that he did receive it in October 2002. The hearing officer found that no TWCC-21 was filed in October 2002. This determination involved a fact issue for the hearing officer and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Carrier asserts that it did not waive the right to contest the compensability of the claim because "the hearing officer determined that the claimant did not sustain an injury as the result of his work duties on \_\_\_\_\_." However, the key fact to consider in this case is that the claimed injury was a back injury and the hearing officer found damage or harm to claimant's back. There is waiver under Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), only in situations where there is a determination that the claimant did not have damage or harm to the physical structure of the body, as opposed to cases such as this, where there is an injury which was determined by the hearing officer not to be causally related to the employment. Texas Workers' Compensation Commission Appeal No. 030430, decided April 7, 2003. To interpret Williamson in the way carrier argues would in essence mean that waiver would only apply to cases in which the claimant would have won absent waiver, which would in effect render Section 409.021 meaningless. We reject such an interpretation.

Carrier contends that there is "really no objective evidence" of damage or harm to the physical structure of claimant's body because x-rays and an EMG were normal, and claimant's treating doctor noted that there was no "functional deficit." However, whether there was damage or harm to the physical structure of claimant's body was a fact issue for the hearing officer to consider. Given the medical notations regarding spasm in claimant's back, the hearing officer could find that there was soft tissue damage. We decline to substitute our judgment for that of the hearing officer. His determination in this regard is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Carrier asserts that, even if the TWCC-21 was not filed until February 3, 2003, carrier offered sufficient evidence to show that the dispute was based on newly discovered evidence. Carrier's adjuster's notes dated October 23, 2002, state, "[c]arrier has proof that claimant was terminated and reported the claim in a retrospective fashion. Constituting a retaliatory claim [sic]." The TWCC-21 filed in February 2003 disputed on the grounds that: (1) claimant did not have an injury; (2) any injury was not in the course and scope of employment; (3) "claimant reported an injury in retaliation"; and (4) claimant did not seek medical treatment until October 7, 2002, after termination. Carrier did not present evidence of any "newly discovered evidence" that came to light

after the 60-day period of Section 409.021(c) had expired. Carrier does not specify on appeal what newly discovered evidence it allegedly found after the 60-day period expired. We perceive no error in the hearing officer's determination that "[t]he carrier's dispute filed with the Commission on February 3, 2003, was not based upon newly discovered evidence."

Carrier contends the hearing officer erred in determining that claimant had disability. Carrier contends that claimant did not have disability because the injury is not compensable. Because the injury is compensable as a matter of law, we affirm the hearing officer's disability determination.

As reformed, we affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**GARY SUDOL  
9330 LBJ FREEWAY SUITE 1200  
DALLAS, TEXAS 75243.**

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Judy L. S. Barnes  
Appeals Judge

CONCUR:

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Margaret L. Turner  
Appeals Judge

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Edward Vilano  
Appeals Judge